

No. _____

05-370 SEP 20 2005

In The OFFICE OF THE CLERK
Supreme Court of the United States

— • —
BRENDA J. BALDWIN,

Petitioner,

v.

**GORDON ENGLAND, Secretary of the Navy,
United States Department of the Navy**

Respondent.

— • —
**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

— • —
**PETITION FOR WRIT OF CERTIORARI
WITH APPENDIX**

— • —
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QUESTION PRESENTED

The Question Presented is:

Whether, in order to establish pretext in an employment discrimination case, the plaintiff must show that the employer's inconsistent reasons provided were in direct contradiction to each other.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brenda J. Baldwin respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., infra, 1a-__a)) is unpublished, but the decision is noted at 137 Fed. Appx. 561 (4th Cir. June 22, 2005). The decision of the District Court for the Southern District of Maryland (App., infra, __a-__a) is unpublished.

JURISDICTION

The Court of Appeals entered judgment on June 22, 2005. The Court of Appeals had jurisdiction pursuant to 5 U.S.C. § 7703(b)(1). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in section 105 of title 5 . . . shall be made free from any discrimination based on . . . sex

42 U.S.C. § 2000e-16(a)

STATEMENT OF THE CASE

Petitioner Brenda J. Baldwin brings this civil rights case to challenge blatant sex discrimination in promotions at the United States Navy in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. In this case, the United States Court of Appeals for the Fourth Circuit has redefined pretext so that the employer's excuses, no matter how varied and inconsistent, must be accepted as legitimate and nondiscriminatory as a matter of law unless they directly contradict one another.

Title VII requires that "all personnel actions . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a). Where, as here, Petitioner offers circumstantial evidence of discrimination, the courts employ the familiar burden-shifting framework of McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this framework, (1) the plaintiff must make out a prima facie case of discrimination, (2) the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions, and (3) finally, the burden shifts back to the plaintiff to show that the defendant's stated reasons were a mere pretext for discrimination. Id. Here, the Fourth Circuit assumed that Petitioner had made out a prima facie case of discrimination and that Respondent had met its burden of proffering non-discriminatory reasons for its decision not to promote Petitioner. App. at 6a.

In a bizarre deviation from the holdings of the First, Third, Sixth, and Eighth Circuits, the Fourth Circuit propounded a novel theory of law by requiring on summary judgment that Ms. Baldwin show that management's statements of its reasons for not promoting her - however varied and inconsistent - could only be considered pretextual if they directly contradicted each other.

The Proceedings Below

Petitioner Brenda J. Baldwin's case arises against a background of rampant and shameless sex discrimination at the United States Navy's Naval Surface Warfare Center in Indian Head, Maryland. At the time she was denied a promotion from GS-11 to GS-12, Ms. Baldwin had worked for the Navy for 20 years, having begun her career in 1980. As a GS-11 Logistics Management Specialist, Ms. Baldwin was in charge of tracking and supplying key munitions (Cartridge Actuated Devices or CADs) that allow the Navy's planes to drop bombs and eject bomb racks. She was also responsible for working on the Navy's highly classified projections of future needs for these CADs. Ms. Baldwin's female colleagues were repeatedly thwarted by the agency's all-male management team in their quests for promotions, obtaining them only after recourse through the grievance procedures. See EEOC Hearing Testimony of John Shumpert, June 12, 2003, at 301 [hereinafter Shumpert Test. at ____]; Stipulated Arbitration Agreement by and between Indian Head Division, Naval Surface Warfare Center and American

Federation of Gov't Employees, AFL-CIO, Local 1923, dated May 18, 2000, at 3.

At the same time Ms. Baldwin's male managers were thwarting the careers of their female employees, these same men were aggressively promoting the careers of the male employees with whom Ms. Baldwin worked as an equal. For example, a male colleague in Ms. Baldwin's chain-of-command with a slightly different specialty obtained a noncompetitive (Gradual Accretion of Duties or "GAD") promotion from GS-11 to GS-12 after their mutual second-line supervisor rewrote his position description. When Ms. Baldwin asked for a GAD promotion, however, all she received was one lame excuse after another.

Ms. Baldwin's first, second, and third-line male supervisors were able to agree on only one thing: that they were not going to promote women if they could avoid it, and consequently they were not going to promote Ms. Baldwin. When Ms. Baldwin first asked her immediate supervisor Stanley Chambers why she could not be promoted, he said that there was going to be a Reduction-in-Force (RIF) (a RIF that curiously did not impede the GS-12 promotions of two of her male colleagues). EEOC Hearing Testimony of Stanley Chambers, June 12, 2003, at 398 [hereinafter Chambers Test. at ____]. On a different occasion, he said that the RIF had no effect on her chance for promotion, Deposition of Stanley Chambers, February 26, 2002, at 55 [hereinafter Chambers Dep. at ____], but there was no need for another GS-12 employee. Chambers Test. at 399. Then he told her that she was at her full promotion potential as a GS-11 (a fact that is irrelevant to a GAD

promotion). Chambers Dep. at 39. He also told her on one occasion that there was a lack of funds, although he later denied doing so. Report of Investigation/EEO Counselor's Report, November 24, 200, at 3; Chambers Dep. At 64.

Mr. Chambers' credibility can be assessed in light of the fact that at an administrative hearing at the EEOC, he revealed for the first time that he formerly had a secret trove of performance notes on Ms. Baldwin on his Navy computer, but that a computer virus had destroyed his hard drive. Mr. Chambers had no print-outs, no back ups, and no specific recollection of what the alleged problems were. Not surprisingly, Mr. Chambers was later demoted from his supervisory position.

Mr. Chambers' chameleon-like explanations as to why Ms. Baldwin could not be promoted, in contrast to her two male colleagues who received GS-12 non-competitive promotions at the time, are sufficiently bemusing that one would expect to infer pretext on the basis of them alone. One would expect that Ms. Baldwin's second-line supervisor would concur in her first-line supervisor's reasons; however, John Shumpert, her second-line supervisor, came up with different reasons than Mr. Chambers. Mr. Shumpert claimed that he needed to monitor Ms. Baldwin's work. Shumpert Test., May 9, 2003, at 92. On second thought, it was because the agency could not process the paperwork. *Id.* at 32. Or was it because the agency could not undergo any personnel actions at that time? *Id.* at 30. Mr. Chambers always had a reason for Ms. Baldwin's nonpromotion, and Mr. Shumpert could

always think up another one even though they never had the same reason. (One would expect that federal managers would be in regular contact about the employees under their supervision.)

As for Ms. Baldwin's third-line supervisor, David Williams, he stated at the administrative hearing for the first time ever that Ms. Baldwin had performance problems, despite her consistently high performance ratings and the significant duties the agency had assigned her (all of which Williams had approved). Of course, he had done nothing to document or address the alleged performance problems at any time prior to the hearing; Mr. Williams' sudden accusation was a spontaneous smear.¹

Despite the compelling evidence of discrimination and pretext² submitted by Ms. Baldwin, the U.S. District Court dismissed the case on summary judgment, incorrectly requiring that Ms. Baldwin had to first request a desk audit before she could file an

¹To advance her career and serve at a higher level of responsibility for the government, Ms. Baldwin had to transfer to another Navy agency where she now serves as a GS-13.

²Ms. Baldwin's co-workers Catharine ("Debbie") Bowie and Carla Clifton both had to file grievances to require the same male managers to promote them from GS-11 to GS-12. By contrast, Mr. Shumpert rewrote the position description of Charles Rutledge, one of their GS-11 colleagues, in order to effectuate his non-competitive GAD promotion to GS-12. It is noteworthy that reaching GS-12 is a precursor to eligibility for GS-13 supervisory positions. Preventing women from reaching GS-12 limited the pool who might ultimately become GS-13 supervisors. Thus, the all-male management team sought to perpetuate itself.

administrative EEO complaint. App. at 18a-19a. (The government's attorney disavowed such a "requirement" at the Fourth Circuit oral argument, and the Court of Appeals did not mention this issue in its decision.)

On appeal of the lower court's entry of summary judgment, the Fourth Circuit, rather than addressing the findings of the district court, assumed that Ms. Baldwin had stated a prima facie case and then simply accepted the male managers' various inconsistent reasons at face value. The Fourth Circuit stated that "the varying explanations offered by the supervisors . . . under these circumstances [do not] suffice to demonstrate pretext." See App. at 8a. The Court of Appeals went on to find that the various reasons "do not contradict each other, but rather reflect various consistent reasons that [Ms. Baldwin] could not be promoted." Id. The Fourth Circuit rejected Ms. Baldwin's proffer of inconsistent reasons because she could not demonstrate the reasons were "contradictory" or "false." Id. at 8a-9a. In so holding, the Court set a higher burden for Ms. Baldwin than this Court's standard in McDonnell-Douglas and its progeny as well as nearly every other Court of Appeal. These other courts have all found that the presentation of inconsistent statements alone is sufficient to defeat a motion for summary judgment as discussed below.